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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 163

WESTERN CARTRIDGE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND AMERICAN FEDERATION OF LABOR AND ITS AFFILIATED ORGANIZATIONS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (V, 11–21)[1] is reported in 134 F. (2d) 240. The findings of fact, conclusions of law, and order of the National Labor Relations Board (I, 13–50) are reported in 44 N. L. R. B. 1.

[1] The printed record filed in this Court is herein designated by a reference to the volume number followed by a reference to the page number.

JURISDICTION

The decree of the court below (V, 26–29) was entered on April 14, 1943. The petition for a writ of certiorari was filed on July 14, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether, upon finding that petitioner had caused its employees to enter into individual employment contracts in order to forestall unionization, that the contracts by their terms impose illegal restraints on the employees' exercise of the rights granted them by the Act, and that the contracts became part of the contract between petitioner and a dominated labor organization, the Board properly ordered petitioner to cease and desist from giving effect to the contracts "or to any modification, continuation, extension, or renewal thereof, and from requesting its employees to enter into any similar contracts."

2. Whether there is substantial evidence supporting the findings of the Board, which were sustained by the court below, that petitioner dominated, interfered with, and supported a labor organization of its employees known as the Independent Union and discriminatorily discharged

William Elliott in violation of Section 8 (1), (2), and (3) of the Act.

3. Whether the Board and the court below erred in sustaining the refusal of the Trial Examiner to permit petitioner to call as witnesses several thousand employees for the purpose of proving the motives which led them to join the dominated labor organization.

STATUTE INVOLVED

The pertinent provisions of the statute involved are set forth in the Appendix, *infra*, pp. 20–21.

STATEMENT

Upon the usual proceedings under Section 10 of the Act (I, 13–16), the Board issued its findings of fact, conclusions of law and order (I, 16–50). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:

Petitioner, a large manufacturer of munitions, has more than 6,000 employees at its plant in East Alton, Illinois, where the unfair labor practices were committed (I, 16–17; 208).[2]

1. THE INDIVIDUAL CONTRACTS

During the summer of 1933, J. M. Olin, petitioner's vice president, finding that unionism was, to quote from his testimony, being "agitated throughout the entire [working] force" (I, 516, 529), addressed a mass meeting of the East Alton

[2] References preceding semicolons are to the Board's findings; succeeding references are to the supporting evidence.

employees and suggested that the employees establish a "Works Council Plan" like that in effect at petitioner's New Haven plant (I, 18; 529–530).[3] The employees did not, however, adopt Mr. Olin's suggestion at this time (I, 18; 536).

Despite the fact that business was at a low ebb in 1933, petitioner, at about the time of Mr. Olin's speech, revived a practice which it had discontinued some twelve years previously of offering its employees individual contracts, which, if lived up to, assured them a bonus of up to 6 percent of their annual earnings (I, 18; 272, 519, 563–567).[4] George Dawson, petitioner's personnel manager (I, 249–250), admitted at the Board hearing that the resumption of this financially

[3] The plan to which Vice President Olin referred has since been disestablished pursuant to a stipulation with the Board.

[4] The contract is for a fixed term, either six months or one year (I, 274), and it obligates the employee to devote his full time throughout that term to the business of the company (Bd. Exh. No. 16–A, I, 563–567, par. 3); breach of that undertaking entails, at the option of the company, the employee's "immediate suspension or dismissal" (*ibid.*, par. 4), and its faithful performance is made a condition precedent to the employee's receiving the bonus stipulated for in the contract. To obtain the bonus, the employee must "continue in the employ of the company for the entire period of [his] contract" (*ibid.*, par. 8). The contract also provides that the company may terminate it in the event of "the nonoperation, or the material curtailment of the operations of the plant * * * due to * * * strikes" (*ibid.*, par. 9). The employee in such case forfeits the bonus plus any sum which the company has deducted from his wages pursuant to the contract if the contingency resulting in the shut-down or curtailment is due "to the fault of the employee" (*ibid.*, par. 9).

burdensome practice was due, in part, to "industrial unrest" resulting from "unionization" (I, 273). Vice President Olin likewise testified that the revival of the contracts was intended to counteract "propaganda" exploiting the collective bargaining aspects of the National Industrial Recovery Act (I, 19; 519–520).[5] On this evidence, buttressed as it was by cogent proof of petitioner's avowed hostility to outside unions,[6] the Board found that the purpose of petitioner in reviving the individual bonus contracts was "to forestall union activity among [its] employees and to create a permanent barrier to union organization among them" (I, 20); and further, that such has been "the effect of the contracts since their introduction" (*ibid.*).[7]

[5] In this connection Mr. Olin stated at the hearing that he "had never been an enthusiast on N. R. A. or anything of its ilk" (I, 520).

[6] We summarized this proof at pp. 10–14, *infra*.

[7] Aside from their illegal purpose and effect, moreover, the Board found that "by [their] terms" the contracts interfered "with the employees' right to engage in concerted activity as guaranteed in the Act" (I, 19). In this connection, the Board pointed out (I, 19–20):

"In effect, the contract purported to give the [company] the right to terminate the employment of any employee who participated in a strike or any other concerted activity regarded as interfering with his 'faithfully' fulfilling 'all his obligations' [under the contract], and to deprive any such employee of his bonus. A premium was thus placed by the [company] on an employee's refusing to engage in concerted activities with his fellow employees, and the full weight of the [company's] approval was used in persuading employees individually to accept this restriction of their rights under the Act."

Since 1933, petitioner has assiduously and systematically urged its employees to sign the individual contracts. After three months' service, all new employees are either sent to the Personnel Department by their foremen or given notice, repeatedly if necessary, to report there for an interview (I, 19; 492–495, 506–508). In these interviews, the employees are told of the benefits which the contract provides and are urged to sign (I, 19; 273–274, 493–498, 559–560). When a contract is about to expire, the employee is notified, again repeatedly if necessary, to report to petitioner's contract office for the purpose of signing a renewal (I, 19; 274, 494–495, 506–508). Of the thousands of employees working for petitioner at the East Alton plant, only four refused, as the assistant to the plant manager testified, to sign the contract in response to this pressure (I, 500–501). In sum, the Board found that "although acceptance of the contracts was theoretically optional with the employees, * * * all employees were expected to sign contracts * * *" (I, 20). On these subsidiary findings, the Board concluded that "by urging and persuading its employees to sign the individual contracts of employment" since July 5, 1935, the date when the Act went into effect, petitioner has "interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act" (I, 21).

2. THE INDEPENDENT

From 1933 to 1937, there was no union among petitioner's employees, but in the spring of 1937 the C. I. O. launched a membership campaign at the East Alton plant (I, 21; 399, II, 23–24, 26, 54.) The Independent [8] was formed to counteract that movement (*ibid.*) Before going ahead with its formation, the principal organizer of the Independent, Charles Taylor, a machinist, asked General Manager Bassett whether petitioner had any objection to the project (I, 21; 315–319, 323). Bassett assured Taylor that petitioner would not object if the employees "stayed within their rights," and did not solicit membership on company time and property (I, 21; 316, 323). Having secured the company's permission to proceed, Taylor and his associates quickly perfected the organization of the Independent, and on June 4, 1937, they launched a vigorous membership drive (I, 22; 299, 319, 362–363, 368–369, II, 16–17). Despite Bassett's admonition, the Independent adherents carried on their organizational activities during working hours, at times in the presence of foremen. Indeed, since its inception, the Independent has extensively engaged in a variety of activities on company time and property, including the collection of monthly dues and the

[8] The full name of this unaffiliated labor organization is Western Cartridge Employees Independent Union (I, 12).

circulation of petitions for the selection of departmental representatives (I, 22, 25; 411, II, 17–18, 22, 23, 24, 26, 57, 74, Tr. 86, 135, 182, 191, 231–232, 279, 288–290).[9] The record does not disclose that petitioner voiced any objection to the use of its time and property for this purpose.

On July 26, 1937, the Independent submitted a proposed working agreement to petitioner, covering hours, wages, and other conditions of employment (I, 23; Bd. Exh. No. 9, I, 550–552, Tr. 73). On August 10, 1937, petitioner submitted to the Independent representatives, as a counterproposal, a so-called "basic agreement" (I, 23; 306–308, II, 19–20, Bd. Exh. No. 10, I, 553–554). The "basic agreement" consisted of three clauses: the first recognized the Independent as the exclusive bargaining agent of the East Alton employees; but only "with respect to all matters not covered by the contracts of employment between the company and those of its employees who have made them" (I, 24; Bd. Exh. No. 10, I, 553); the second clause declared that "neither the company nor the [Independent] admit or assert any right to change said contracts of employment without the consent of"the parties thereto, but if the parties should from time to time agree that a modification of the individual contract was desirable, the proposed

[9] The symbol "Tr." designates references to portions of the record which have not been printed in either the supplement to petitioner's brief or the appendix to the Board's brief, filed in the court below.

change shall be "recommended" to the employees (*ibid.*); and the third clause provided that the contract should remain in force for one year and thereafter until terminated by a prescribed notice (*ibid.*). The "basic agreement" was executed on August 12, 1937 (I, 24; II, 18–21, Bd. Exh. No. 10, I, 553–554).

The membership of the Independent began to decline in the latter part of 1940 (I, 25; 55–56). The security of its position was, moreover, threatened at this time by an organized drive which the American Federation of Labor had begun among the employees of the smokeless powder division (I, 26; 53),[10] where an A. F. of L. union was formed (I, 27; II, 10–11). To meet this threat, the executive committee of the Independent appealed to General Manager Bassett for aid (I, 25–26; 55–57, 61–62). Bassett informed the Independent representatives that the directors of the company had authorized a wage bonus of 2 percent to be given signers of the individual contracts, and Bassett suggested to the Independent representatives that "if the [Independent] got credit for [the bonus], * * * it would build [the Independent's] membership up" (I, 26; 55–59, 61–64). Notices conforming to Bassett's sug-

[10] A river flows through the plant site, separating the smokeless powder division from the other departments (I, 17; II, 22). To distinguish between the smokeless powder division and the other departments, we refer to the latter as the Western Side.

gestion were posted on the plant bulletin boards the day after this conference (I, 26; 59, 63). Petitioner gave the Independent further assistance at this time by entering into a working agreement with it, granting higher wages and improved working conditions in the casting department, where dissatisfaction was then rife (I, 27; 91–92, 110–114, 116–117, Bd. Exh. No. 15, I, 561–562).[11]

Throughout the A. F. of L. campaign and especially after it was extended to the Western Side, petitioner's officials and supervisors discouraged employees from membership in the A. F. of L. smokeless powder division union (I, 29). Thus, for example, Thomas Wortz, the superintendent of the smokeless powder division, sent for the president of the A. F. of L. union there and told the employee that he could "go places" with the company if he would "make [himself] right with them," adding the clarifying statement that the employee would be sent to the training school for foremen (I, 29; II, 27, I, 172–173). Wortz then went on to say that the employees should deal with the company through a "union of [their] own," instead of going over to East St. Louis and

[11] Day, the superintendent of the casting shop, and McCauley, his assistant, repeatedly prodded employee William Elliott, the Independent representative for that department, to be more aggressive in his Independent post (I, 27–28; 91, 545–546, II, 54, 55–56, 60–61). Day told Elliott that he saw no reason why "the Independent Union couldn't be made to work," adding that he counted on Elliott to help him in attaining that objective (I, 28; II, 55–56).

get[ting] a pot-bellied racketeer" to represent them (I, 29; II, 27–28). Wortz terminated the interview by saying that the A. F. of L. union was "no good," that it was made up of "a bunch of guys" who were "bosses and wouldn't work," men who lived off the wages of employees paid out in union dues (I, 29; II, 27, 28).[12]

On May 26, 1941, the A. F. of L. union,[13] chartered for employees in the smokeless powder division, won a Board election (I, 32; II, 109, Bd. Exh. No. 3–E). Disregarding the Board's certification of Local Union No. 22574 as the statutory bargaining agent of the employees in the smokeless powder division, petitioner entered into a new contract with the Independent on June 4, 1941, reaffirming the grant of exclusive recognition to the Independent as bargaining representative for *all* employees in the plant (I, 32; 72–73, Bd. Exh. No. 13, II, 132–139, 35–36, 62). On June 13, 1941, petitioner refused to recognize Local Union No. 22574, contending that the Board's unit determination was erroneous and that petitioner's June 4, 1941, contract with the Independent pre-

[12] Wortz used similar tactics in attempting to induce two other employees to resign from the A. F. of L. union (I, 29–30; II, 41–43, 77). Other supervisors followed his example in combating the A. F. of L. union (I, 30–32; II, 78–79, I, 483-486, II, 22, I, 54, II, 74–76, 45–48, 79–80, I, 86–88, 477–479).

[13] The name of this union is Chemical Workers, Local Union No. 22574 (A. F. of L.), hereinafter called Local Union No. 22574.

cluded such recognition (I, 33; Bd. Exh. No. 3–D, II, 107–108).[14]

On reviewing the foregoing evidence, the Board found that petitioner "encouraged, supported, and maintained the Independent in order to impede, and, if possible, prevent genuine self-organization of [its] employees" (I, 38).

3. THE DISCHARGE OF ELLIOTT

William Elliott, a machinist, entered petitioner's employ in 1925 (I, 39; II, 54). Concededly, he was a good workman during his many years in petitioner's employ (I, 102, 134–135, II, 64–65). He was discharged, allegedly, for having repeatedly criticized the management (I, 40; 92–109). The Board found that the company's explanation for his dismissal was a pretext to conceal the unlawful motive for his discharge (I, 42–43).

When the A. F. of L. membership campaign was under way, Superintendent Day and Supervisor McCauley repeatedly prodded Elliott to be more aggressive in discharging his duties as the representative of the Independent in their department (I, 27–28; II, 54, 55–56, 60–61, I, 91, 545–546). See fn. 11, *supra,* p. 10.

[14] After the National War Labor Board had intervened, petitioner formed a separate corporation which took over the operation of the smokeless powder division, and the new corporation entered into a contract with the A. F. of L. union, banning the use of the individual contracts in the smokeless powder division (I, 33–34; Bd. Exh. Nos. 3–K, 3–L, II, 117–127, 147–165).

These admonitions culminated in Day's statement to Elliott that he should become more aggressive as an Independent representative or resign the post (I, 28; 545–546). Elliott resigned from the Independent following this episode, and joined the A. F. of L. union, becoming its financial secretary on July 23, 1941 (I, 27–28, 39; II, 56–57, 67). His election to office in the A. F. of L. union became known immediately to the supervisors in his department (I, 39; II, 68–69, 71–72). His discharge occurred on July 25, 1941, two days after he became an officer of that union (II, 61–62).

The Board rejected petitioner's contention that Elliott was discharged because of his criticism of the management (I, 42): his chief complaint concerned the administration of a bonus system which petitioner had discontinued long prior to Elliott's dismissal; his known views on that subject had, moreover, been tolerated for years (I, 42; 91–93, Tr. 506–507). His disapproval of a proposal to change shift schedules—the incident which, assertedly, led to his discharge—was voiced at the express invitation of the management (I, 39; 146, 152–153, II, 89). In these circumstances, and especially in view of Superintendent Day's admission at the hearing that Elliott's apathy as an Independent representative was a contributing cause for his discharge (I, 28–29; 96), the Board concluded that "Elliott's critical attitude was used by the [com-

pany] as a pretext" to conceal the fact that he "was discharged * * * because of his withdrawal from the Independent and because of his membership in and activity on behalf of [the A. F. of L. union]" (I, 43).

Upon the foregoing subsidiary findings, the Board concluded (I, 47) that petitioner had interfered with, restrained, and coerced its employees in violation of Section 8 (1); and dominated, contributed support to, and interfered with the formation and administration of the Independent in violation of Section 8 (2) and (1); and had illegally discriminated against Elliott in violation of Section 8 (3) and (1). In addition to the usual cease and desist provisions, the Board's order directed petitioner to cease giving effect to the individual contracts found to violate the Act, to disestablish the Independent, to reinstate Elliott with back pay, and to post the usual notices (I, 48–50).

Thereafter, petitioner and the Independent filed separate petitions [15] for review in the court below (V, 1–2), and the Board answered, requesting enforcement (V, 2–8). In its opinion of March 1, 1943 (V, 11–21), the court below enforced the Board's order in full. On April 14, 1943, a decree was entered in conformity with the opinion (V, 26–29).

[15] On December 12, 1942, the court below ordered consolidation for the purposes of briefing and argument (V, 10).

ARGUMENT

1. Contrary to petitioner's repeated assertion (Pet. 2–3, 6, 9–10, 15–22), the individual contracts here involved were explicitly found to be the product of unfair labor practices because they were employed by petitioner to discourage its employees from becoming members of an outside union, and their effect, as intended, "has been to forestall union activity among [petitioner's] employees and to create a permanent barrier to union organization among them" (I, 20). This finding, concurred in by the court below (V, 16–17), is amply supported by the evidence summarized in the Statement (*supra*, pp. 3–6). In itself, this finding warranted the abrogation of the individual contracts, since, as this Court held in *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, the Board may require an employer to cease giving effect to individual contracts which "have been procured in violation of the [Act]" (309 U. S. at 351; see also 359–360).[16] A second and independent ground for the abrogation of these contracts is that their terms impose "illegal restraints upon the employees' rights to organize and bargain collectively guaranteed by Sections 7 and 8 of

[16] See also *National Labor Relations Board* v. *Superior Tanning Co.*, 117 F. (2d) 881, 890–892 (C. C. A. 7), certiorari denied, 313 U. S. 559; *National Labor Relations Board* v. *Stone*, 125 F. (2d) 752, 754–756 (C. C. A. 7), certiorari denied, 317 U. S. 649.

the Act" (the *National Licorice* case, 309 U. S. at 359–360). Still another reason for their invalidation is that they are an integral part of the bargaining relationship between petitioner and the Independent (*supra,* pp. 8–9). Hence, their abrogation is required to make effective the cease and desist and disestablishment order relating to the Independent. Cf. *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272, 275; *National Labor Relations Board* v. *J. Greenebaum Tanning Co.*, 110 F. (2d) 984, 988 (C. C. A. 7), certiorari denied, 311 U. S. 662.

Petitioner's contention that the terms of the individual contracts do not offend the Act, even if correct, would not warrant further review since the invalidation of the contracts is independently supported by the findings, based on substantial evidence, that they are the fruits of petitioner's unfair labor practices and are part of the bargaining relationship with the dominated Independent. The correctness of these findings, concurred in by the court below, manifestly presents no question of general importance.

2. Petitioner's contention (Pet. 3) that the Board's order restrains it "in perpetuity" from making individual contracts of employment even though they do not violate the Act proceeds from a mistaken interpretation of the order.[17] Read in

[17] This same contention was made in the petitions for certiorari filed in the *Superior Tanning* and *Stone* cases, *supra*, p. 15.

its context, the challenged provision of the order forbids only contracts subject to the infirmities which rendered continued performance of the contracts here involved inconsistent with the guarantees of the Act. The requirement that petitioner refrain from giving effect "to any modification, continuation, extension, or renewal" of the illegal contracts, and from "requesting its employees to enter into any similar contracts of employment" (I, 48) is therefore but a reasonable safeguard "to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past." *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 436–437.

3. Petitioner's contention that the Board's findings in regard to Elliott and the Independent, which were concurred in by the court below (V, 19–20), are not supported by substantial evidence raises no question of general importance. In any event, the evidence supporting those findings, summarized in the Statement (*supra*, pp. 7–14), is substantial and is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229.

4. Petitioner's final contention (Pet. 10–11, 24–29) that it was deprived of a fair hearing be-

cause the Trial Examiner refused to allow it to call several thousand employees to testify as to why they joined the Independent was properly rejected by the court below (V, 18–19). The Trial Examiner allowed the parties to examine any witness who participated in the organizational stage of the Independent as to his reasons for joining (I, 404–405, 458). He excluded testimony of this character on the part of those who joined thereafter, stating: "It certainly would be highly cumulative and put an impossible burden upon the Trial Examiner and the Board here to ask two thousand or possibly more witnesses [to be called for that purpose]" (I, 458). The exclusion of this cumulative testimony was clearly a proper exercise of the Trial Examiner's discretion. *Donnelly Garment Co.* v. *National Labor Relations Board,* 123 F. (2d) 215 (C. C. A. 8) (Pet. 24–28), is not in conflict with the challenged ruling. The court explicitly recognized in the *Donnelly* case that cumulative evidence may be excluded where its reception would prolong the hearing beyond all reasonable bounds (123 F. (2d) at 222). Furthermore, the evidence excluded in the *Donnelly* case (contained in an offer of proof which was 23 pages long) included a great variety of facts bearing upon the domination issue, in addition to the notoriously unreliable subjective testimony here excluded. Cf. *United States* v. *General Motors Corp.,* 121 F. (2d) 376, 404–405 (C. C. A. 7), certiorari denied, 314 U. S. 618; *Bethlehem Steel Co.*

v. *National Labor Relations Board,* 120 F. (2d) 641, 653 (App. D. C.). *National Labor Relations Board* v. *Indiana & Michigan Electric Co.,* 318 U. S. 9, relied upon by petitioner (Pet. 28–29), is also not in conflict with the decision in this case. In the *Indiana & Michigan* case, this Court held that it would not disturb the exercise by the lower court of a discretionary authority to grant a new hearing where certain leaders of the complaining union had resorted to violence while the Board proceeding was under way. Such a decision manifestly in no way conflicts with the challenged ruling in the case at bar.

CONCLUSION

The decision of the court below is correct and presents neither a conflict of decisions nor any question of general importance. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1943.